No. 17-949

In The
Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in his Official Capacity as Alaska Regional Director of the National Park Service, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF ALASKA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

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INTEREST OF AMICUS CURIAE[1]

As the Court has recognized, this case "touch[es] on vital issues of state sovereignty." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1072 (2016). This Court should hear the case again to safeguard Alaska's rights as a sovereign and to protect the State's uniquely significant need for control of state-owned lands and waters.

Alaska owns the riverbed and manages the waters of the Nation River and other lands and rivers falling within the boundaries of federal areas, called Conservation System Units (CSUs), that were created by the Alaska National Interest Lands Conservation Act (ANILCA). *See* 16 U.SC. §3101 *et seq.*; 43 U.S.C. § 1311(a); Alaska Statehood Act, § 6(m), 72 Stat. 343 (1958). Alaska's "ownership of submerged lands and the accompanying power to control navigation, fishing, and other public uses of water is an essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (internal quotes omitted); *Coyle v. Smith*, 221 U.S. 559, 573 (1911). ANILCA endorsed Alaska's sovereign right to manage its lands, waters, and resources by providing that state, Native, and private lands located inside CSU boundaries would not be managed as if they were federally owned. 16 U.S.C. § 3103(c). This distinction is essential to ANILCA's purpose of providing "adequate opportunity for satisfaction of the economic and social needs of the State of

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[1] In compliance with Supreme Court Rule 37.2(a), Alaska provided counsel of record with timely notice of its intent to file this amicus brief.

Alaska and its people." 16 U.S.C. § 3101(d). Alaska has a direct and profound interest in maintaining its authority to keep its waterways open, as Congress intended, without broad federal regulatory interference.

Despite the Court's direction to consider these "vital issues of state sovereignty," *Sturgeon*, 136 S. Ct. at 1072, on remand the Ninth Circuit gave the National Park Service expanded regulatory control over state-owned lands and waters. Pet. App. 12a-14a, 19a. The Ninth Circuit's decision treats the submerged lands that Alaska acquired at statehood as federally owned lands, reading the term "public lands" expansively and ignoring ANILCA's admonition not to treat state lands the same as federal ones. If left uncorrected, the decision has broad ramifications that extend well beyond its blow to Alaska's sovereignty. It ignores the needs and realities of rural Alaskans, who face unparalleled challenges in accessing the transportation thoroughfares they rely upon to provide for their families. Alaska has compelling interests in preserving its sovereign right to responsibly manage its lands and waters and in protecting its citizens' ability to use the state's waterways.

SUMMARY OF THE ARGUMENT

This case considers the extent to which ANILCA permits the exercise of federal jurisdiction over state waters. The right to regulate and manage state-owned resources is an essential component of Alaska's

sovereignty. And the freedom to use and access navigable waters is essential to many Alaskans' way of life. By granting the National Park Service regulatory jurisdiction over state waters, the Ninth Circuit's decision threatens that way of life. The decision contravenes ANILCA's text and Congress's intent in enacting the law, dramatically redefines this Court's federal reserved water rights jurisprudence to the detriment of state sovereignty, and ignores the clear statement doctrine. If left to stand, the decision invites federal agencies to wield plenary regulatory control over non-federal waters and submerged lands. The decision raises significant sovereignty issues and has broad practical and economic ramifications, warranting this Court's review.

REASONS THE PETITION SHOULD BE GRANTED

The Court acknowledged this case's importance when it granted review the first time, and the case has only gained significance since then. Preserving ANILCA's express limits on the federal government's regulatory authority in Alaska is an issue of exceptional importance to the State and its people, and Mr. Sturgeon's petition once more presents an appropriate and timely vehicle for the Court to address it. The Ninth Circuit's decision on remand again tramples Alaska's sovereignty by effectuating a federal takeover of Alaska's navigable waters. The court's new rationale fails to properly construe ANILCA and the balance it

struck between federal and state authority in Alaska, and it compounds that problem with an incorrect expansion of the federal reserved water rights doctrine – an important federal question of law that the Ninth Circuit got wrong and that has broad implications in all public land states.

To the extent that this case arises from ANILCA's Alaska-specific text, a circuit split on this issue cannot occur. Review on certiorari provides the only opportunity for Alaskans to retain their rights to their lands, waters, and resources, and to meaningfully assure Alaska's sovereignty over its waters.

I. Certiorari is warranted because the Ninth Circuit's decision contravenes ANILCA Section 103's assurances that Alaska would retain its sovereign right to manage its lands and waters and because it imposes exceptional hardships on Alaskans.

A. Rural Alaskans depend on Alaska's lands, waters, and resources for many of their transportation, economic, and social needs.

Alaska occupies an area equivalent to one-fifth of the continental United States's landmass, and over 60% of all land in Alaska is owned by the federal government. As the largest landowner in the state, the federal government already manages an area more than four times the size of Wyoming. By contrast, the federal government owns only 4% of lands in the

non-western states. Colossal and disproportionate federal land ownership in Alaska makes the State's freedom to manage its lands, waters, and resources crucial to Alaska's political independence and economic health.

Alaska is home to abundant natural resources, including over 12,000 rivers and three million lakes – the largest network of navigable waters in the country. The State also is home to myriad fish and wildlife, significant oil and natural gas reserves, and economically viable subsurface mineral deposits. Alaska's vast terrain and wild beauty captivate the national imagination and its bounty of resources fortifies both the state and national economies. But Alaska's massive size, widely dispersed population, lack of developed infrastructure, variable topography, and extreme climate also make it the nation's most remote state. Over three-quarters of Alaska's 300 communities and roughly 20% of its 735,000 residents live in regions unconnected to the road system. Half of these residents live in the State's most remote villages, communities with disproportionately higher levels of poverty and limited infrastructure, some lacking essential services like water and sanitation. These rural citizens are acutely reliant on Alaska's resources to provide for their families. The State's ability to manage these resources in accordance with unique realities, local needs, and historical customs is thus critical to its sovereign interests.

Roadless rural Alaskans primarily travel by all-terrain vehicles; airplanes – generally regional, small bush plane, or private air service; snowmachines; and

boats. Alaska's mountainous northern climate further shapes the unusual nature of the State's limited transportation options: severe storm patterns routinely disrupt air service and rivers seasonally evolve into ice roads.

Alaska's waters provide essential travel corridors year round. Many rural citizens, particularly in southwest Alaska, live in small, isolated villages stretched along rivers, and depend on these networks of water connections for their everyday needs. Major rivers like the Yukon and Kuskokwim serve as critical arteries for transporting commercial fuel and goods to much of western Alaska throughout the summer months. Especially in more remote areas, Alaskans rely on these waters to access health care, goods, and services; recreate; and travel to hunting and fishing grounds. In winter, Alaska's rivers freeze into highways for snowmachine, dogsled, and all-terrain vehicle traffic, remaining a vital part of the State's transportation infrastructure that allows Alaskans to access vital goods and services. Alaska's rivers have functioned in this way for hundreds of years.

Because Alaska's rural villages are so isolated, residents in these communities also face economic challenges. Rural residents confront a formidable combination of high costs of living, little or no local tax base, fewer job opportunities, and limited earnings. Localized resource-based activities – such as local tourism and recreation-related jobs or small-scale mining, sport fishing, wildlife guiding, or trapping – often

provide an essential part of families' incomes and contribute to the economic activity of the region.

Alaska has an acute interest in retaining its management authority over water-based access routes and in crafting management decisions to account for local needs – needs that might be ignored or eclipsed by federal land management agencies with singular conservationist priorities and a national constituency. State regulators understand the unusual realities of life in Alaska and use that knowledge to design rules that consider local conditions, practices, and needs. But federal regulators – who may never even visit Alaska, let alone develop a nuanced understanding of the unique aspects of rural Alaskan life – lack this knowledge or focus. As a result, the nationwide regulations they impose can be ill-fitting for Alaska.

For example, in permitting hovercraft to operate on state waters, Alaska has prioritized opening its waters to meet the access and transportation needs of residents like Mr. Sturgeon, whom the Park Service apprehended for taking his hovercraft to hunting grounds. The federal government's national prohibition on hovercraft use might be sensible in Lower 48 parks where waters are used only for tourism and wilderness activities, but it is overbearing and harmful in Alaska, where, even in remote wilderness areas, citizens must use rivers for everyday transportation and to access necessities like food, fuel, and health care.

What is at stake here for Alaska, therefore, is not just a disagreement with the National Park Service

about permissible weekend recreation or the best method of routing tourists through national parks. Because "Alaska is different," *Sturgeon*, 136 S. Ct. at 1070, the State's continued management of its waters and lands is essential to maintain unencumbered access and meaningful use of Alaska's natural resources by its citizens.

B. Alaska's sovereign right to regulate, use, and manage its lands and waters is instrumental to Alaska's statehood and ANILCA's purpose.

Management and control of Alaska's natural resources is not only vital to its residents, but also lies at the heart of the State's sovereign identity. As this Court emphasized in its prior decision, a central motivation for Alaskans seeking statehood in 1956 was to allow the resource-rich territory to manage its own lands and waters. *Sturgeon*, 136 S. Ct. at 1064-65.

Before statehood, Alaska benefitted little from the extraction of its minerals or from the fur trade and fishing industries. Congress, not Alaska's territorial government, owned nearly all the land and had most of the authority over land laws, natural resources management, and fiscal matters. Terrence M. Cole, *Blinded by Riches: The Permanent Funding Problem and the Prudhoe Bay Effect*, Inst. of Soc. and Econ. Research, Jan. 2004.[2] Mining taxes were low and thus contributed little, and "only a tiny fraction of the wealth from

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[2] Available at http://www.iser.uaa.alaska.edu/Publications/blindedbyriches.pdf, at 33.

the salmon industry ever directly touched Alaska's shores." *Id.* at 36; *see also id.* at 50-52.

When delegates gathered in 1955 to draft the Alaska Constitution, they expected an enormous grant of land and minerals from Congress at statehood to sustain the new state. The delegates "were uniform in their belief that Alaska's natural resources had been 'locked up' and devalued by the negligent actions of the federal government and absentee owners," and that the careful development of Alaska's resources "spelled the difference between a future of plenty or of poverty." Gerald A. McBeath, The Alaska State Constitution 159 (2011).

Members of the convention's resources committee also acknowledged the difficulty of reconciling the desire to develop Alaska's resources with the need to avoid the resource exploitation of the past. Victor Fischer, Alaska's Constitutional Convention 132-33 (1975). The delegates ultimately drafted an entire constitutional article directing the State to practice prudent resource development that would most benefit all Alaskans. Article VIII recognized the critical importance to the State of thoughtful, internal management of Alaska's resources, and commanded that Alaska's resources be reserved to the people "for maximum use consistent with the public interest" and providing for free access to Alaska's navigable or public waters. Alaska Const. art. VIII, §§ 1, 14. Alaska's new constitution then served as the basis for subsequent statehood petitions to Congress.

Congress, concerned that Alaska would not otherwise be able to raise sufficient revenue to carry out the responsibilities of statehood, gave it 103 million acres of land and mineral rights to fund self-governance. Alaska Statehood Act, § 6(a), (b), (i), 72 Stat. 340, 342. "The primary purpose of the statehood land grants . . . was to ensure the economic and social well-being of the new state." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). Through these land grants, Congress recognized that Alaska stood ready, willing, and able to manage its resources. It relinquished federal control of Alaska's resources to the people who best understood the State's needs – Alaskans.

As this Court recognized, under the terms of the Submerged Lands Act and the constitutional equal footing doctrine, at statehood Alaska "gained 'title to and ownership of the lands beneath navigable waters' within the State, in addition to 'the natural resources within such lands and waters,' including 'the right and power to manage, administer, lease, develop, and use the said lands and natural resources.'" *Sturgeon*, 136 S. Ct. at 1065 (quoting § 3(a), 67 Stat. 30, 43 U.S.C. § 1311(a); § 6(m), 72 Stat. 343)). Only once its ability to control and manage the Sate's lands and waters was assured could Alaska begin its journey toward self-sufficiency and prosperity.

C. ANILCA's requirement that state lands be treated differently from federal lands protects Alaska's sovereign rights.

Twenty-one years after statehood, Congress passed ANILCA, reserving over 100 million acres of federal land in Alaska – an area larger than California – for the primary purposes of conservation and protection. 16 U.S.C. § 3101 *et seq*. Vast swaths of Alaska's new and expanded national parks, wildlife refuges, wild and scenic rivers, national trails, wilderness preservation systems, and national forest monuments were organized into CSUs managed by different federal land management agencies. 16 U.S.C. § 3102(4). Roughly 40% of Alaska now falls within an ANILCA conservation system unit, and Alaska's National Parks now make up two-thirds of the entire National Park System.

While ANILCA reserved massive amounts of land – significantly limiting the possibility for Alaska's future economic development – it also included provisions meant to protect Alaska's authority. Congress's statement of purpose acknowledges ANILCA's twin goals: to protect the national interest in scenic, natural, cultural, and environmental values on public lands in Alaska, but also to continue to "provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d).

Congress protected Alaska's ability to direct the use of its own lands and waters by expressly stating

that non-federal "lands" – defined to include state waters as well as uplands – falling within newly expanded park boundaries would not be regulated as if they were federally owned. 16 U.S.C. §§ 3102(1), 3103(c) (providing non-federal lands are not "subject to the regulations applicable solely to [federal lands] within such units"). By the time ANILCA was passed, the State, private landowners, and Alaska Native Corporations had existing ownership interests in lands and waters across Alaska, so the federal areas ANILCA created encapsulated these non-federal areas into islands located within CSUs. Section 103(c) assures Alaska's sovereign authority to manage its waters and lands by excluding from CSUs those non-federal lands that happen to be located within unit boundaries. 16 U.S.C. §§ 3103(c), 3102(1), (3)(b)-(c), (11). This subsection further provides that, should the federal government wish to regulate non-public lands as part of a system unit, it must first acquire them; only then may the new lands become part of the unit and "be administered accordingly." 16 U.S.C. § 3103(c). By removing these non-federal lands and waters from the reach of the extensive regulatory regime applicable to federally owned parklands nationwide and drawing hard boundaries between how the different categories of lands should be treated, Section 103(c) limits federal jurisdiction and protects against abuse of federal regulatory power.

Now, for the second time, the Ninth Circuit nullified that guarantee, awarding the Park Service – and presumably other federal land management agencies

– broad authority to regulate state waters as federal lands. The Ninth Circuit's decision endorses further federalization of state-owned resources and subjects Alaskans to federal regulatory control in a manner that Congress neither authorized nor intended. Congress's careful balance between its dual goals of conservation and local control, and Alaska's longstanding sovereign right to manage its lands and resources, now lie in peril.

II. The Ninth Circuit's contortion of the federal reserved water rights doctrine threatens Alaska's political and economic sovereignty.

A. The Ninth Circuit's decision on remand disregards this Court's direction to construe ANILCA to protect Alaska's sovereignty and respect its uniqueness.

In 2016, this Court articulated governing principles for how to evaluate ANILCA and the Park Service's attempt to exercise management and control within CSUs. This Court reviewed Alaska's history, stressing that the Alaska Statehood Act, Alaska Native Claims Settlement Act, and ANILCA all reflect Congressional recognition that the proper state-federal balance was crucial to Alaska's economic health and prosperity. *Sturgeon*, 136 S. Ct. at 1064-66, 1070-71. The Court explained how ANILCA balanced the goals of conservation and local control. *Id.* at 1066 (quoting 16 U.S.C. § 3101(d)). And it discussed the "numerous Alaska-specific exceptions to the Park Service's

general authority over federally managed preservation areas" that are "woven throughout ANILCA," reflecting Congress's delicate balance. *Id.* at 1070-71. As this Court recognized, numerous aspects of ANILCA reinforce the importance of Alaska's difference and sovereignty – specifying, for example, that the Park Service cannot prohibit, even on federal lands, "certain activities of particular importance to Alaskans." *Sturgeon*, 136 S. Ct. at 1066 (citing 16 U.S.C. §§ 3170(a), 3201); *see also id.* at 1070-71 (citing 94 Stat. 2393, 16 U.S.C. §§ 3121(b), 3201).

Although the Court did not reach the question that the Ninth Circuit now has decided – whether the Nation River qualifies as "public lands" within the meaning of ANILCA, allowing broad federal management and regulation – its opinion stressed that "ANILCA repeatedly recognizes that Alaska is different" from other states, because of its majestic terrain and remoteness, the importance of Native Alaskan and subsistence values to the state, and its heightened need for state-managed resource development and use. *Id.* at 1070. ANILCA reflects "the simple truth that Alaska is often the exception, not the rule," and the law "contemplates the possibility that all the land within the boundaries of conservation system units in Alaska may be treated differently from federally managed preservation areas across the country, and that 'non-public' lands within the boundaries of those units may be treated differently from 'public' lands within the unit." *Id.* Applying these principles, this Court reversed the Ninth Circuit's initial reading of the

statute, calling it a "contorted and counterintuitive" reading of the statute because it was inconsistent with Congress's special solicitude for local control. *Id.* at 1071-72.

But on remand the Ninth Circuit again read ANILCA to erase distinctions between public and non-public lands and to eliminate state control in favor of national oversight. By holding that ANILCA transforms countless Alaskan navigable waters into federal lands, the Ninth Circuit once again endorsed a legal theory that subjects Alaska to plenary federal control. The Ninth Circuit's opinion lacks this Court's attention to principles of sovereignty and local control. It also contravenes this Court's legal precedents, ANILCA's text, and Congress's intent.

B. The Ninth Circuit's redefinition of the federal reserved water rights doctrine disregards this Court's precedents and tramples on state sovereignty.

Whether the Nation River qualifies as "public lands" in ANILCA is a legal issue that "touch[es] on vital issues of state sovereignty." *Id.* at 1072. ANILCA Section 103(c) imposes hard limits on the federal government's ability to regulate non-public lands, specifying that "[o]nly those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). The Ninth Circuit concluded that the Nation

River – a navigable waterway owned and traditionally regulated by the State – qualifies as "public lands" because Congress implicitly reserved an undefined and unquantified level of instream flow when it created the Yukon-Charley preserve. This stretches the federal reserved water rights doctrine beyond all recognition. It also ignores Congress's decision to craft ANILCA to protect Alaska's sovereignty. Neither Congress's direction nor this Court's cases support the Ninth Circuit's conclusion.

1. The Ninth Circuit's decision conflicts with this Court's water rights jurisprudence.

The Ninth Circuit held that the United States has an "implied reservation of water rights [in the Nation River], rendering the river public lands." Pet. App. 19a. The court determined that "non-public land is still subject to [regulations applicable only to public lands] if the United States retains an interest in it because the land is public to the extent of the interest." Pet. App. 8a. It acknowledged that the State holds title to the submerged lands at issue, but held that the United States retained a reserved interest in the waters flowing above the submerged lands, such that the waters are public lands under ANILCA. That holding profoundly distorts the reserved water rights doctrine and the equal footing doctrine.

To reach its conclusion, the Ninth Circuit relied on a muddled and distinguishable circuit precedent. The

Ninth Circuit's "*Katie John*" decisions concerned only subsistence activities under ANILCA's Title VIII, which are not now and have never been at issue in this case.[3] In *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) [*Katie John I*], the Ninth Circuit held that "public lands include some specific navigable waters as a result of reserved water rights" – but only for the sole purpose of administering ANILCA's rural subsistence priority under a unique statutory title. *Id.* at 704. Indeed, the court explicitly cautioned that its holding was limited to those portions of ANILCA "necessary to give meaning to [ANILCA's] purpose of providing an opportunity for a subsistence way of life." *Id.* at 702 n.9. The *Katie John I* court remained convinced that "ANILCA does not support [] a complete assertion of federal control" over Alaska's navigable waters. *Id.* at 704. In broadening *Katie John* well beyond the subsistence context, the Ninth Circuit now has embraced that federal takeover. It was wrong to do so.

Under this Court's jurisprudence, a federal reserved water right is a limited, non-ownership right to use or preserve a specific volume of water. When the federal government withdraws and reserves lands for a public purpose, such as creating a national park, it "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the

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[3] Nor has any party to this case challenged the federal subsistence regulations that effectuate Title VIII's subsistence priority. Alaska supports the subsistence regulations – but this does not and need not require the State to cede control of its navigable waters to the federal government for all purposes.

purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). This Court has strictly limited the scope of this doctrine: it applies only to "that *amount of water* necessary to fulfill the purpose of the reservation, no more." *Id.* (emphasis added).

Thus, in *Cappaert*, this Court examined the extent of the federal government's reserved water rights in the Devil's Hole National Monument, a deep limestone cavern in Nevada containing a subterranean pool home to a rare and endangered pupfish. In establishing the national monument, Congress's direction to give special protection to the pool and the fish living in it established a federal reserved water right – but the government's interest extended only to preserve the exact amount of water necessary to keep the fish alive. *Id.* at 141. To ensure that the doctrine remains limited to the amount of water absolutely necessary to fulfill the government's purposes – a crucial check on federal authority – courts applying the doctrine "carefully examine[] both the asserted water right and the specific purposes for which the land was reserved, and [must] conclude[] that without the water the purposes of the reservation would be entirely defeated." *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

The Ninth Circuit did not adhere to this limiting principle. It made no attempt to constrain the National Park Service's reserved water rights interest to the minimum amount of water necessary to prevent the purposes of the Yukon-Charley reservation from being entirely defeated. Instead, the court decided that the Park Service's reserved water right extended to

prevent any water use that would merely *impact* the purposes of the reservation. Pet. App. 17a-18a. This novel redefinition of federal reserved water rights vastly expands the doctrine and completely defeats Alaska's rights in its waters just because there may be *some* federal interest in *some* use of the water. And the Ninth Circuit's analysis no longer treats the reserved water rights doctrine as concerning use of a particular amount of water, as this Court has required. Instead, the Ninth Circuit has invoked the doctrine to justify a wholesale grant of federal management authority over Alaska's navigable waters. This is a startling expansion of the doctrine, and one with no foundation in this Court's jurisprudence.

Even that holding would not have been enough, on its own, to entitle the federal government to regulate navigable waters that flow through CSUs. But the Ninth Circuit took another remarkable step and ruled that the United States has "title" to the water that is subject to reserved water rights. This was necessary in order to transform state waters into federal lands under ANILCA's definition section. ANILCA authorizes the federal government to regulate "public lands," which it defines as "[f]ederal lands." 16 U.S.C. § 3102(3). "Federal land" in turn is defined as "lands the *title* to which is in the United States." *Id.* § 3102(2) (emphasis added). And "land" includes "lands, waters, and interests therein." *Id.* § 3102(1). But the United States does not hold "title" to navigable waters as to which it has reserved water rights, let alone to the lands underlying Alaska's navigable waters. The Ninth

Circuit conceded that "reserved water rights are not a 'title' interest . . . in a narrow, technical sense," Pet. App. 16a (internal quotes omitted), but found "a vested interest in the water" to be good enough. *Id.* at 17a. It is not. If Congress intended that a non-title "interest" in water could make a river "public lands" that are fully subject to the power of federal regulation, it would have written the statute to say that.

Other provisions of ANILCA confirm that Congress did not intend that a federal usufructuary right – an interest far less than title – would transform entire lands and rivers into "public land," enabling broad federal regulation for all purposes. One example is that Section 103(c) limits the ability of the Secretary to regulate state, private, or other non-federal lands unless it purchases or otherwise acquires them. Yet the Ninth Circuit now gives the Park Service this right to regulate state waters without any purchase, compensation, or acquiescence from the State. *Cf.* 16 U.S.C. § 3192a.

The Ninth Circuit's ruling subverts not only ANILCA, but also the constitutional equal footing doctrine, the Submerged Lands Act, and the Alaska Statehood Act. At statehood, Alaska took title to its submerged lands as an "essential attribute" of state sovereignty, *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987), which Congress formally recognized in the Submerged Lands Act and the Statehood Act, *see* 43 U.S.C. § 1311(a) (incorporated into the Alaska Statehood Act, 72 Stat. 343 § 6(m) (1958)). Along with title to the submerged lands, the State

received management power over the navigable waters themselves, 16 U.S.C. § 3210(b), and over the fish located in the waters. *See* 43 U.S.C. § 1311(a) (confirming and establishing state ownership and management of "the natural resources within such lands and waters"); 43 U.S.C. § 1301(e) (defining "natural resources" to include fish). Title to the lands underlying navigable waters is important to a state's sovereign authority and obligation to regulate waters in trust for the people for navigation, commerce, and fishing. *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). That is particularly true here given Alaska's unique history and the realities of life for many of its residents.

Although navigable waters themselves are not usually considered subject to traditional title ownership, they run together with the submerged lands they overlie; title to the bed of navigable waters "necessarily carries with it control over the waters above them." *Id.* Thus, the Submerged Lands Act recognized state assumption of both "submerged lands and waters." *United States v. California*, 436 U.S. 32, 37 (1978). Ever since statehood, then, Alaska has had sovereign control and management authority over its waters. *See also PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012) (explaining that under equal footing doctrine, "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable" as a matter of constitutional grace, and may "allocate and govern those lands according to state law" as sovereign).

The Ninth Circuit did not and could not explain how a federal reserved water right eclipses the State's

sovereign interests in managing its waters. Had Congress meant to grant the Park Service broad regulatory power over Alaska's navigable waters superseding Alaska's sovereign ownership and control, it would have done so clearly and directly. Indeed, this Court's cases require that such interference with state control must be unambiguous and plain – another fundamental legal principle that the Ninth Circuit ignored.

2. The Ninth Circuit's decision conflicts with this Court's clear statement cases.

The Ninth Circuit not only distorted this Court's water rights jurisprudence, it also ignored the legal doctrine that functions as a crucial check on the precise power transfer that the Ninth Circuit endorsed: the clear statement doctrine.

"Congress does not exercise lightly" the "extraordinary power" to "legislate in areas traditionally regulated by the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The clear statement doctrine effectuates this principle, serving as a necessary safeguard against unwarranted federal assumption of power. Under the doctrine, courts will not interpret a statute to "alter the usual constitutional balance between the States and the Federal Government" unless Congress has made "its intention to do so unmistakably clear in the language of the statute." Congressional intent to infringe on state sovereignty must be "plain to anyone reading [it]" through a "clear and manifest statement."

Gregory, 501 U.S. at 467; *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (internal quotation marks omitted). This rule "acknowledge[s] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. In violation of these principles, the Ninth Circuit's reading of ANILCA significantly intrudes upon Alaska's sovereignty without clear Congressional intent to alter the traditional federal-state balance over management of navigable waters.

The clear statement doctrine applies wherever federal regulation "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (*SWANCC*). This is unquestionably true here, for the expansive regulatory jurisdiction the Ninth Circuit appears to have created will be used to significantly impair Alaska's "traditional and primary power over land and water use" by forcibly removing Alaska's control of its submerged lands and navigable waters. *Rapanos*, 547 U.S. at 738; *see also SWANCC*, 531 U.S. at 172-73 (noting that clear statement requirement is especially crucial "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power"). But the Ninth Circuit made no effort to apply the doctrine.

Had the Ninth Circuit applied these principles, it could not have reached the result it did, for ANILCA

does not contain any statement, much less the required clear statement, of Congressional intent to force Alaska to cede control over its waters to the federal government. Indeed, the text of ANILCA, hundreds of pages long, does not mention navigable waters or reserved water rights at all. Nor does its definition of "public lands" as "lands, waters, and interests therein" the "title to which is in the United States," clearly and manifestly include navigable waters, because the government does not hold "title" either to a non-possessory right to preserve instream flows or to the underlying submerged lands. In fact, Congress expressed the intent to *exclude* navigable waters from the definition of "public lands," by explicitly exempting all "lands . . . granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A).

The Ninth Circuit's failures to correctly apply either the reserved water rights doctrine or the clear statement doctrine combine to create a particularly damaging legal landscape for states. In one blow, the Ninth Circuit has dramatically expanded the scope of federal regulatory authority and overridden local control of state waters, while simultaneously sweeping away the clear statement rule's protections against federal usurpation of state authority.

C. The Ninth Circuit's decision threatens states' authority under other federal statutes and in waters outside CSU boundaries.

Alaska is not the only sovereign whose control over its waters is threatened by the Ninth Circuit's decision. It also threatens other states and Native Tribes within the Circuit because ANILCA's definition of "public lands" appears verbatim in numerous other public lands statutes, and because the Ninth Circuit's decision appears to permit federal regulation of state-owned waters appurtenant to federal lands and waters.

When this Court last considered this case, it considered a statutory construction question applicable only to Alaska. But the Ninth Circuit's reserved water rights rationale is not limited to waters lying within the boundaries of ANILCA units in Alaska. The federal reserved water rights doctrine is judicially created and applies across the nation. And as Mr. Sturgeon points out, ANILCA's definition section – which the Ninth Circuit relied on to hold that Alaska's navigable waters are "public lands" – appears verbatim in numerous other public lands statutes across the west. Pet. 26-27 & n.1. The Ninth Circuit's rationale therefore invites the federal government to usurp control of navigable waters in parks and federal areas throughout the Circuit. This Court should not allow the Circuit's legal errors to compromise the sovereign interests of states across the west.

Making matters worse, the federal government's newly granted management authority also may extend well beyond the geographic scope of waters physically running through federal areas. Under the Ninth Circuit's "immensely broad" concept of appurtenance, the government's reserved water right gives it control of not just the portions of the navigable waterway that lie inside CSU boundaries, but also *other* waters appurtenant to the reserved federal land. *John v. United States*, 720 F.3d 1214, 1229-31 (9th Cir. 2013). The potential scope of the government management authority over what were previously clearly Alaska's waters now includes "all the bodies of water on which the United States' reserved rights could at some point be enforced – *i.e.*, those waters that are or may become necessary to fulfill the primary purposes of the federal reservation." *Id.* The scope of this holding is breathtaking, possibly including most or all of Alaska's waters – and without any clear congressional intent to deprive Alaska over those submerged lands and waters.

If allowed to stand, the Ninth Circuit's opinion could thus result in a federal takeover of state waters across the west – including waters that are not located inside the boundary of federal areas. This Court should not permit this to happen. It should grant Mr. Sturgeon's petition and ensure that state sovereignty is respected in the Ninth Circuit as this Court and Congress have directed.

CONCLUSION

For all these reasons, this Court should grant the petition.

Respectfully submitted,

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